

UNITED STATES DEPARTMENT OF COMMERCE  
Patent and Trademark Office  
Trademark Trial and Appeal Board  
2900 Crystal Drive  
Arlington, Virginia 22202-3513

Bottorff

Cancellation No. 22,092

Imasco Enterprises Inc.

v.

Genesis Integrated  
Systems, Inc.

Before Cissel, Hanak and Quinn, Administrative Trademark  
Judges. By the Board.

**INTRODUCTION AND BACKGROUND**

This case now comes up on the parties' contested cross-motions for summary judgment. Petitioner has moved for summary judgment in its favor on its pleaded Section 2(d) ground for cancellation. Respondent has cross-moved for summary judgment in its favor on petitioner's Section 2(d) ground for cancellation, and also has moved for entry of summary judgment in its favor on the unpleaded defenses of laches, estoppel and acquiescence. For the reasons discussed below, we grant petitioner's motion for summary judgment and deny respondent's cross-motion for summary judgment. See Fed. R. Civ. P. 56(c).

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Respondent is the owner of Registration No. 1,670,749, which is of the mark GENSTAR for goods identified as "computer hardware; namely, CD-ROM drives and CD-ROM players; computer software; namely, CD-ROM titles for educational and training purposes," in International Class 9. The registration, which issued on December 31, 1991, arose from an intent-to-use application filed by respondent on April 16, 1990. In the Statement of Use filed in connection with the application, respondent alleged first use of the mark anywhere on April 27, 1990 and first use of the mark in commerce on August 13, 1990. An affidavit under Trademark Act Section 8, 15 U.S.C. §1058, has been filed by respondent and accepted by the Office.

On August 2, 1993, petitioner filed a petition to cancel respondent's Registration No. 1,670,749, alleging as grounds therefor that petitioner is the prior user of the trademark, service mark and trade name GENSTAR in connection with a variety of goods and services, including services which are substantially similar and generally related to the goods identified in respondent's registration; that petitioner owns several registrations of the GENSTAR mark, including incontestable Registration No. 1,328,522<sup>1</sup>

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<sup>1</sup> Issued April 2, 1985, from application Serial No. 73/371,235, filed June 21, 1982. It appears from the Office's records that Registration No. 1,328,522, as issued, originally identified goods and services in Classes 19, 36, 37, 39, 40 and 42. Currently, the registration is active in three classes, covering

covering, inter alia, services recited as "rental of electronic instrumentation, test and measurement equipment, microprocessors and computer peripheral products" in Class 42; that petitioner has filed a new application by which it seeks to obtain a separate registration of its GENSTAR mark for "rental of electronic instrumentation, test and measurement equipment, microprocessors and computer peripheral products" in Class 42,<sup>2</sup> and that the Trademark Examining Attorney has refused registration to petitioner under Trademark Act Section 2(d), citing respondent's intervening Registration No. 1,670,749; and that, because petitioner has priority and because confusion is likely given the identity of the parties' marks and the close

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the following services: "mortgage banking; arranging real estate joint venture financing; real estate and mortgage financing services; capital equipment leverage-lease brokerage; and providing a rental purchase program for all electronic instrumentation, testing and measuring equipment," in Class 36; "real estate planning services," in Class 37; and "distributorship services in the field of construction materials, recycled gas and landfill; distributorship services in the field of sludge and sludge disposal equipment; sludge management, consulting and engineering services in the field of sludge disposal; rental of electronic instrumentation, test and measurement equipment, microprocessors and computer peripheral products," in Class 42.

<sup>2</sup> The services recited in petitioner's new application Serial No. 74/250,934 are identical, in part, to the services recited in petitioner's multi-class Registration No. 1,328,522. Petitioner asserts in its application file that it seeks to obtain a separate registration for the specified Class 42 services because it wants to be able to assign its registration rights in those services to a third party while retaining its registration rights as to the other services recited in the registration. Petitioner is precluded, under Office policy, from dividing the specified services out from Registration No. 1,328,522 into a separate registration. See TMEP section 1105.06(b).

relationship between the parties' respective goods and services, respondent's Registration No. 1,670,749 should be cancelled under Trademark Act Section 2(d).

In its answer to the petition for cancellation, respondent admits that petitioner has filed a new application to register the mark GENSTAR, but denies all of the other allegations in the petition for cancellation on the basis of insufficient knowledge and information. Respondent has not pleaded any affirmative defenses.

#### **THE PARTIES' SUMMARY JUDGMENT ARGUMENTS AND EVIDENCE**

In support of its motion for summary judgment on its Section 2(d) claim, petitioner argues that there is no genuine issue of material fact as to its priority, inasmuch as the filing date of the application which matured into its Registration No. 1,328,522 predates the filing date of the application which matured into respondent's Registration No. 1,670,749. Petitioner also argues that there is no genuine issue of material fact as to any of the relevant *du Pont*<sup>3</sup> likelihood of confusion evidentiary factors and that, when the evidence pertaining to those factors is weighed, confusion is likely as a matter of law.

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<sup>3</sup> *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

Specifically with respect to the likelihood of confusion evidentiary factors, petitioner argues that the parties' marks are identical; that respondent's GENSTAR computer products are legally identical to the computer products offered for rental by petitioner under its GENSTAR mark; that consumers in the market for such computer products have the option of either purchasing such goods or renting them, such that respondent and petitioner essentially are competitors in the computer products field; that the identification of goods in respondent's registration does not include any limitation as to the trade channels or classes of customers for respondent's goods, and that those goods accordingly are presumed to move in all normal trade channels for such goods, including rental trade channels, and to be marketed to all normal classes of customers for such goods, including renters; that the computer resellers and retailers who carry computer products like respondent's, e.g., CompUSA, also commonly offer rental services for such products; and that the absence of any evidence of actual confusion is not dispositive, nor is it sufficient to outweigh the other factors which warrant a finding of likelihood of confusion in this case.

As evidence in support of its summary judgment motion, and in opposition to respondent's cross-motion, petitioner has submitted a status and title copy of its pleaded

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Registration No. 1,328,522, as well as copies of certain documents from the file of petitioner's application Serial No. 73/250,934, namely, the application paper, the Trademark Examining Attorney's final action refusing registration to petitioner under Section 2(d) based on respondent's Registration No. 1,670,749, and the Trademark Examining Attorney's action suspending the application pending the outcome of this cancellation proceeding.

Petitioner also has submitted copies of respondent's answers to petitioner's interrogatories. Petitioner specifically relies on those answers which demonstrate that on March 1, 1990, prior to filing the application which matured into the registration sought to be cancelled herein, respondent obtained a trademark search report which disclosed petitioner's Registration No. 1,328,522; that respondent advertises its goods in computer publications; that the trade channels through which respondent distributes its goods include computer resellers (including systems integrators), value-added resellers and computer catalogs; that respondent's customers include a wide range of suppliers of computers and related goods; that respondent's goods are directed to anyone interested in CD-ROM drives; and that respondent's reseller customers are authorized to use respondent's GENSTAR mark in their advertising.

Petitioner also has submitted copies of certain of respondent's marketing brochures, offered to show that respondent sells its goods to computer resellers for resale to the general public; a copy of a CompUSA advertisement which appeared in the May 19, 1991 Philadelphia Inquirer, offered to show that respondent's GENSTAR external CD-ROM drive is offered at CompUSA for resale to consumers, and also to show that CompUSA leases, as well as sells, computers and computer peripheral products; a copy of a commercial search report purporting to show that it is common for a single source to use a single mark as a trademark for computers and computer peripheral products and as a service mark for rental services for those products;<sup>4</sup> copies of excerpts from the November 14, 1995, November 21, 1995, November 28, 1995 and December 5, 1995 issues of the Official Gazette, depicting various marks that were published for opposition and purportedly offered to show that it is common for an applicant to apply to register a

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<sup>4</sup> We have given little or no consideration to this search report evidence. Search reports generally are not proper evidence when offered in support of a motion for summary judgment. See TBMP section 528.05(d). In any event, petitioner's search report printout consists of references to seven applications and one registration, all of which were filed either on the basis of intent-to-use under Trademark Act Section 1(b) or on the basis of a foreign registration or application under Trademark Act Section 44. Because these applications and registrations are not based on use in commerce, they are of little probative value on the issue of whether the listed goods and services are of a type which may emanate from a single source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993).

single mark both for "computers" and for "computer related services";<sup>5</sup> and copies of excerpts from the "Computers" section of the April 1995 to March 1996 edition of the Nynex Business to Business Directory, in which appear advertisements for companies that both sell computers and computer-related products and also rent and lease computers and computer-related products.

In opposition to petitioner's motion for summary judgment, and in support of its own cross-motion for summary judgment, respondent makes two primary arguments. First, respondent argues that petitioner's claim is barred by laches, estoppel and acquiescence, which are valid defenses in a cancellation proceeding pursuant to Trademark Act Section 19, 15 U.S.C. §1069. Respondent contends that when respondent's mark was published for opposition, petitioner carefully considered whether or not to file a notice of opposition and elected not to do so, evidently concluding that confusion was unlikely and that it would not be damaged by registration of respondent's mark; that respondent relied to its detriment on petitioner's decision not to oppose registration of respondent's mark and on petitioner's

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<sup>5</sup> The "computer-related services" covered by these Official Gazette excerpts are primarily computer programming, design, and consulting services. None of the excerpts identify the type of computer product rental services offered by petitioner. Accordingly, this evidence is of little probative value on the issue of whether the goods identified in respondent's registration and the rental services recited in petitioner's registration commonly emanate from a single source.

failure to otherwise object to respondent's use of the mark, in that respondent proceeded to carry on its business under the mark and to develop valuable goodwill therein; and that respondent is entitled to continued reliance on petitioner's previous "conscious inaction" and "manifest acquiescence," inasmuch as there has been no change of circumstances with respect to the likelihood of confusion evidentiary factors which would provide a basis for allowing petitioner to avoid its previous determination that confusion is unlikely.

Second, respondent argues that petitioner's previous determination that confusion is unlikely was correct on its merits. In this respect, respondent contends that there have been no instances of actual confusion despite the parties' concurrent use of their marks for the past five years. Respondent also argues that confusion is unlikely because consumers encounter the parties' respective marks in different contexts. Specifically, respondent argues, respondent uses GENSTAR as a trademark applied to tangible goods, in contrast to petitioner, who does not use GENSTAR as a trademark applied to goods but rather as a service mark in connection with the rental of goods. The computer products petitioner rents do not bear the GENSTAR mark, respondent contends, but rather the marks of their respective manufacturers. Furthermore, respondent argues, confusion is unlikely because the parties' respective goods

and services are marketed to different types of consumers, in that respondent's goods are marketed to persons interested in purchasing computer products, while petitioner's services are directed to persons interested in renting computer products. Finally, respondent argues that confusion is unlikely because consumers of respondent's goods and petitioner's services are relatively sophisticated and are not likely to make impulsive purchasing decisions based primarily on the presence of either party's mark.

As evidence in support of its summary judgment arguments, respondent has submitted copies of three requests for extension of time to oppose that were filed by petitioner in late 1990 and early 1991, after publication of respondent's mark for opposition. In those extension requests, petitioner asserted, as its good cause showing, that it required additional time to review respondent's application and to consider whether a notice of opposition to registration of applicant's mark should be filed.

Respondent also has submitted the declaration of Thomas W. Kenyon, respondent's co-founder and Chief Financial Officer. Mr. Kenyon avers that he prepared and filed the application which matured into the registration involved herein; that, at the time respondent's mark was published for opposition, respondent had not yet invested substantially in the GENSTAR mark and would have been

willing to adopt a different mark if petitioner had proceeded with its contemplated opposition to respondent's registration of the GENSTAR mark; that when petitioner did not file a notice of opposition, and did not object in any manner to respondent's continued use of the mark, respondent interpreted petitioner's "conscious inaction" as petitioner's acquiescence to respondent's use and registration of the GENSTAR mark; that respondent now has been using the mark for five years and has established valuable goodwill therein; and that respondent has sold its goods under the GENSTAR mark in all fifty states and in the District of Columbia and is unaware of any consumer confusion as to the source of either party's goods or services.

Finally, respondent has submitted a copy of the specimen of use from petitioner's pending service mark application. The specimen is a copy of an advertisement appearing in the March 21, 1989 issue of Data Communications which establishes, according to respondent, that the computer products petitioner rents do not bear petitioner's GENSTAR mark, but rather bear the marks of their respective manufacturers.

In opposition to respondent's cross-motion for summary judgment on the issues of laches, estoppel and acquiescence, petitioner argues that respondent cannot obtain summary

judgment on such defenses because respondent failed to plead them in its answer to the petition for cancellation and has not moved to amend its answer to assert such defenses; that, in any event, laches is not a sufficient defense in this case because likelihood of confusion is inevitable or not in reasonable doubt; that respondent has not established and cannot establish the elements of a laches defense, inasmuch as petitioner did not unreasonably delay in filing the petition for cancellation, nor did petitioner commit any affirmative act which might reasonably have induced respondent to believe that petitioner had abandoned its claim, nor did petitioner commit any affirmative act upon which respondent could have relied to its detriment; and that respondent's assertion of laches is disingenuous because respondent, at the time it adopted its GENSTAR mark and filed its application for registration thereof, had actual knowledge of petitioner's prior use of and rights in the mark and therefore acted at its own risk in continuing to use the mark and develop its business thereunder.

**DISCUSSION**

Summary judgment is appropriate in cases where the moving party establishes that there are no genuine issues of material fact which require resolution at trial and that it is entitled to judgment as a matter of law on its pleaded

claim or defense. Fed. R. Civ. P. 56(c). An issue is material when its resolution would affect the outcome of the proceeding under governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is genuinely in dispute if the evidence of record is such that a reasonable factfinder could return a verdict in favor of the nonmoving party. *Id.* The nonmoving party must be given the benefit of all reasonable doubt as to whether genuine issues of material fact exist, and the evidentiary record on summary judgment, and all inferences to be drawn from the undisputed facts, must be viewed in the light most favorable to the nonmoving party. See *Opryland USA, Inc. v. Great American Music Show, Inc.*, 970 F.2d 847, 23 USPQ2d 1471 (Fed. Cir. 1992); *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992).

We turn first to respondent's motion for summary judgment in its favor as to the defenses of laches, estoppel and acquiescence. It is well-settled that a party may not obtain summary judgment on an issue which has not been pleaded, nor may a party defend against a motion for summary judgment by asserting the existence of genuine issues of material fact as to an unpleaded defense. See *Paramount Pictures Corp. v. White*, 31 USPQ2d 1768 (TTAB 1994); *Blansett Pharmaceutical Co. Inc. v. Carmrick Laboratories, Inc.*, 25 USPQ2d 1473 (TTAB 1992); *Perma Ceram Enterprises*

*Inc. v. Preco Industries Ltd.*, 23 USPQ3d 1134 (TTAB 1992); see also TBMP sections 528.07(a) and (b). In the present case, respondent did not plead laches, estoppel and acquiescence as affirmative defenses in its answer to the petition for cancellation. Nor has respondent moved under Fed. R. Civ. P. 15(a) for leave to amend its answer to assert these affirmative defenses. In view thereof, and in view of the fact that petitioner has expressly objected to respondent's motion for summary judgment to the extent that the motion is based on these unpleaded defenses, we deny respondent's motion for summary judgment on the issues of laches, estoppel and acquiescence.<sup>6</sup>

We turn next to the parties' cross-motions for summary judgment with respect to petitioner's pleaded Section 2(d) ground for cancellation. There is no genuine issue of material fact as to petitioner's priority. In the absence

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<sup>6</sup> Even if respondent had properly pleaded the affirmative defenses of laches, estoppel and acquiescence, we still would conclude, on the present record, that it is petitioner, not respondent, who is entitled to summary judgment as to those defenses. In essence, respondent's asserted defense is that because petitioner previously sought and obtained three extensions of time to oppose registration of respondent's mark and then failed to file a notice of opposition, petitioner now is estopped to petition to cancel respondent's registration. However, simply by itself, petitioner's failure to file a notice of opposition to registration of respondent's mark does not affect petitioner's right to petition to cancel respondent's registration. See *Keebler Company v. Rovira Biscuit Corporation*, 624 F.2d 366, 207 USPQ 465, 471 at footnote 5 (1st Cir. 1980); *Charles of the Ritz, Inc. v. Elizabeth Arden Sales Corporation*, 161 F.2d 234, 73 USPQ 413 (CCPA 1947). Thus, respondent's purported affirmative defenses are without substantive merit in this case.

of any contradictory evidence pertaining to the parties' dates of first use of their respective marks, the earliest date of use upon which either party can rely is the filing date of the application which matured into its registration. *See American Standard Inc. v. AQM Corporation*, 208 USPQ 840 (TTAB 1980). The application which matured into petitioner's pleaded Registration No. 1,328,522 was filed on June 21, 1982, and the application which matured into respondent's involved Registration No. 1,670,749 was filed on April 27, 1990. Accordingly, petitioner has priority in this case.

Furthermore, for the reasons discussed below, we find that there is no genuine issue of material fact as to any of the *du Pont* likelihood of confusion factors for which there is evidence in the record. Balancing those undisputed facts which support (or which might reasonably be construed to support) respondent's contention that confusion is unlikely against those undisputed facts which support petitioner's contrary contention that confusion is likely, we conclude that, as a matter of law, confusion is likely in this case.

First, we note that the parties' marks, as they appear in their respective registrations, are identical. Accordingly, we find that there is no genuine issue of material fact with respect to the first *du Pont* likelihood of confusion evidentiary factor, i.e., the similarity or

dissimilarity of the parties' marks in their entireties in terms of appearance, sound, connotation and commercial impression.

Likewise, there is no genuine dispute that the parties' respective goods and services, as identified in their registrations, bear a close commercial relationship to each other, under the second *du Pont* evidentiary factor. Where the parties' marks are identical, as they are in this case, it is only necessary that there be a viable relationship between the goods or services in order to support a holding of likelihood of confusion. *See In re Concordia International Forwarding Corp.*, 222 USPQ 355, 356 (TTAB 1983). Such a viable relationship exists in this case. Respondent uses its GENSTAR mark on "computer hardware; namely, CD-ROM drives and CD-ROM players." Those goods are legally identical to and encompassed within the "computer peripherals" that petitioner rents under its own GENSTAR mark. It is well settled that confusion may result from the use of the same mark for goods, on the one hand, and for services involving those goods, on the other. *See generally* TMEP section 1207.01(a)(ii) and cases cited therein.

Nor can it be genuinely disputed that the parties' respective goods and services move in the same trade channels, under the third *du Pont* evidentiary factor, or that they are marketed to the same classes of customers, *see*

*MRI Systems Corp. v. Wesley-Jessen Inc.*, 189 USPQ 214 (TTAB 1975). The identification of goods in respondent's registration contains no limitations as to the trade channels for respondent's goods nor as to the classes of customers for respondent's goods. Accordingly, respondent's goods must be presumed to move in all normal trade channels for such goods and to be marketed to all normal classes of customers for such goods. See *Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987); *CBS, Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198 (Fed. Cir. 1983).

Respondent has submitted no evidence to support its claims that the trade channels through which computer products are offered for sale are distinct from the trade channels through which computer products are offered for lease, and that persons interested in purchasing computer products comprise a distinct class of customers vis-à-vis persons interested in renting computer products. Petitioner, on the other hand, has submitted persuasive, unrebutted evidence establishing that it is common for computer retailers to offer computer products such as those identified in respondent's registration to their customers both for sale and for lease. See, e.g., the Nynex Business to Business Directory listings attached to petitioner's

reply brief as Exhibit 6, and the CompUSA advertisement attached to petitioner's reply brief as Exhibit 3.

In view of petitioner's evidence establishing that the trade channels and classes of customers for the parties' respective goods and services are the same, and in the absence of any evidence from respondent upon which we might reasonably base a contrary conclusion, we find that there are no genuine issues of material fact as to these likelihood of confusion factors.

Respondent also argues that the consumers of respondent's goods and petitioner's services are relatively sophisticated purchasers and are unlikely to make impulsive purchasing decisions based primarily on the parties' respective marks.<sup>7</sup> However, respondent has presented no evidence in support of this contention, nor is there any evidence in the record from which the accuracy of that contention might reasonably be inferred. The conclusions and suppositions of respondent's counsel do not suffice to create a genuine issue of material fact on this question.

In short, we find that there are no genuine issues of material fact as to the identity of the parties' marks, nor as to the similarity of and close commercial relationship between the parties' respective goods and services, as

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<sup>7</sup> The fourth *du Pont* likelihood of confusion evidentiary factor is "the conditions under which and buyers to whom sales are made, i.e. 'impulse' vs. careful, sophisticated purchasing."

identified in their respective registrations, nor as to the essential identity of the trade channels and classes of customers for those goods and services. The undisputed evidence on these likelihood of confusion factors weighs heavily in favor of a finding that confusion is likely in this case.

The record, viewed in its entirety, also contains evidence with respect to certain other of the *du Pont* evidentiary factors which, for purposes of deciding petitioner's summary judgment motion, we find to be undisputed and to weigh in favor of respondent's position that there is no likelihood of confusion in this case.

First, it is undisputed that there have been no known instances of actual confusion despite the parties' concurrent use of their respective marks for over five years. Construing the evidence of record on this issue in respondent's favor, we will presume that an opportunity for actual confusion, commensurate with the evidence of the nature and extent of the parties' actual use of their respective marks, has existed.<sup>8</sup> The absence of actual

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<sup>8</sup> It appears from respondent's answers to petitioner's interrogatories, attached to petitioner's motion for summary judgment as Exhibit 3, that respondent has used its mark in all fifty states and the District of Columbia; that in 1991 respondent had gross sales of \$2,085,000 and spent \$38,000 on advertising; that in 1992 respondent had gross sales of \$3,135,000 and spent \$57,000 on advertising; and that in 1993 respondent had gross sales of \$2,150,000 and spent \$54,000 on advertising. However, the record is silent with respect to the

confusion, under the seventh and eight *du Pont* evidentiary factors,<sup>9</sup> tends to support respondent's contention that there is no likelihood of confusion.

Second, construing the evidence of record in respondent's favor for purposes of deciding petitioner's summary judgment motion, we find that the evidence pertaining to *du Pont* evidentiary factor number 10(d)<sup>10</sup> tends to weigh in respondent's favor in this case. As discussed above in connection with our rejection of respondent's unpleaded laches defense, petitioner's failure in 1991 to oppose registration of applicant's mark does not operate as an estoppel to petitioner's right to bring this cancellation proceeding against respondent's registration. However, we reasonably construe petitioner's previous failure to oppose to be evidence which is "indicative of lack of confusion," under *du Pont* factor 10(d), and thus as

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nature and extent of petitioner's sales and advertising of its computer product rental services under its GENSTAR mark.

<sup>9</sup> The seventh and eighth *du Pont* evidentiary factors are "the nature and extent of any actual confusion," and "the length of time during which and conditions under which there has been concurrent use without evidence of actual confusion." *In re du Pont, supra*, 177 USPQ at 567.

<sup>10</sup> *du Pont* factor 10(d) is "the market interface between applicant and the owner of a prior mark: . . . laches and estoppel attributable to owner of prior mark and indicative of lack of confusion."

evidence which tends to support respondent's contention that confusion is unlikely.<sup>11</sup>

However, upon careful consideration and balancing of all of the likelihood of confusion evidentiary factors for which there is evidence in the record, we find that, in the circumstances of this case, the evidence on those factors which favor respondent, i.e., the absence of actual confusion and the previous conduct of petitioner's which can be construed as being indicative of a lack of confusion, simply is outweighed by the undisputed evidence on the other evidentiary factors which strongly supports a finding of likelihood of confusion, i.e., the identity of the parties' marks, the close commercial relationship between the parties' respective goods and services, and the substantial similarity of the trade channels and classes of customers for the parties' respective goods and services.

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<sup>11</sup> In the same vein, we will presume from the evidence of record that petitioner, when it decided in 1991 not to oppose registration of respondent's mark, was of the opinion, at that time, that confusion was unlikely. The fact that petitioner previously held an opinion regarding the existence of likelihood of confusion which is contrary to its current opinion on that issue is a fact which "may be received in evidence as merely illuminative of shade and tone in the total picture" confronting the Board as it decides the likelihood of confusion issue in this case. See *Interstate Brands Corporation v. Celestial Seasonings, Inc.*, 576 F.2d 926, 198 USPQ 151, 154 (CCPA 1978). However, petitioner's previous contrary opinion that confusion was unlikely is not controlling or determinative in this case, nor does it relieve the Board of its burden of evaluating and weighing all of the evidence of record pertaining to the *du Pont* evidentiary factors and reaching its own ultimate conclusion on the issue of likelihood of confusion. *Id.*

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Because there are no genuinely disputed factual issues which require trial for their resolution, because the undisputed facts of record establish, as a matter of law, that petitioner is entitled to judgment on its Section 2(d) claim, and because respondent has neither pleaded nor established the existence of any defense to that claim, we grant petitioner's motion for summary judgment, and deny respondent's cross-motion for summary judgment. See Fed. R. Civ. P. 56(c). The petition for cancellation is granted, and respondent's Registration No. 1,670,749 shall be cancelled in due course.

R. F. Cissel

E. W. Hanak

T. J. Quinn

Administrative Trademark Judges  
Trademark Trial and Appeal Board